



## Miscellaneous late 2015 decisions

ASSET CONFISCATION UPDATE

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### Recent cases

In the sprint to the finish last year, I did not manage to report on some of the decisions concerning litigation under the Proceeds of Crime Act 2002 (POCA).

I now provide an update of those decisions.

#### **Re Application by the Commissioner of the Australian Federal Police [2015] VSC 774 (Riordan J) – Application for examination orders**

The Commissioner of the Australian Federal Police (Commissioner) sought an *ex parte* restraining and examination order, as well as an order that the defendant provide a sworn statement of assets.

Riordan J made the *ex parte* restraining order but refused to make the examination and statement of assets order on an *ex parte* basis. In short, his Honour was not satisfied that it was appropriate to make such ancillary orders without first hearing from the affected persons. As the Court observed,

there was no urgency in making any of the ancillary orders.

Riordan J was critical of the Commissioner's solicitor's failure to bring to his attention, during the *ex parte* application, the various authorities in which judges had cautioned against making examination orders on an *ex parte* basis.

If any examination orders are made *ex parte*, practitioners ought to obtain a copy of the transcript to ascertain whether the decision of Riordan J (and the cases referred to within it) were drawn to the attention of the Court before making an examination order. The Commissioner has a positive duty to draw these cases to the attention of the Court. If not, that may, of itself, constitute a sufficient basis to discharge the *ex parte* examination order.

**Commissioner for the Australian Federal Police v Dong Hua International Investments Pty Ltd & Anor [2015] VSC 748 (T Forrest J) – Application for examination orders**

The Commissioner sought orders that certain persons be examined under the POCA, prior to the hearing of the Commissioner's forfeiture application and certain exclusion applications.

The examination application was opposed by some of the proposed examinees. The opposition was based on the following:

- a contention that the structure of the POCA evidenced a predisposition against ordering the examination of persons prior to the hearing and disposition of the Commissioner's forfeiture application;
- a contention that the examinations ought to be denied because they would result in further delay in the proceeding and the likely vacation of the trial date in early 2016; and
- insofar as the foreign resident examinees were concerned, that there was no power to compel them to attend an examination, alternatively that the Court ought not compel a foreign national to travel to Australia to attend an examination.

T Forrest J found that the structure of the POCA did not evince a predisposition against ordering examinations prior to the hearing and determination of the Commissioner's forfeiture application.

The Commissioner's counsel, during the course of the hearing, undertook on behalf of the Commissioner to pay the reasonable costs of travel from China to Victoria for the foreign resident respondents to the examination application.

Notwithstanding that undertaking, his Honour refused to order examinations, other than of the local resident applicant for an exclusion order, so

as to avoid further delay in the proceeding. The Commissioner could have sought examination orders for several years but failed to do so. The trial was imminent.

The question whether the Court has power to compel a foreign national to attend Australia for an examination was not decided. It is likely to be shortly decided in some extant applications presently before the Supreme Court of Victoria.

**Director of Public Prosecutions (Cth) v Gay (No 2) [2015] TASSC 58 – Assessment of pecuniary penalties for insider trading**

On 1 December 2015, Estcourt J delivered the second part of his Honour's decision concerning the quantification of a pecuniary penalty order.

In that case, Mr Gay had sold his shares with inside information concerning the poor performance of Gunns. In the first decision of Estcourt J (*Director of Public Prosecutions v Gay* [2015] TASSC 15), his Honour held that in the assessment of any pecuniary penalty order, it was appropriate that the purchase price of the shares be taken into account (in contrast to the long line of drug cases which established that the cost of drugs is to be disregarded in assessing a pecuniary penalty order). His Honour then deferred the further hearing of the application.

Importantly, Mr Gay sold the shares at a loss, albeit with inside information. Hence, it was contended for him that he received no benefit from the insider trading at all and that, therefore, the pecuniary penalty ought to be assessed at nil.

His Honour rejected the argument and held that, Mr Gay did receive a benefit because, had he sold the shares some weeks later (after the market had been fully informed about Gunns' financial performance) his loss would have been greater.

His Honour found that the benefit was the additional loss avoided by reason of the earlier sale of the shares.

**Ruzehaji v Commissioner of the Australian Federal Police [2015] SASCFC 182 – Stay of proceedings / examinations**

On 10 December 2015, the Full Court of the South Australian Supreme Court (Gray, Peek and Nicholson JJ) handed down its decision dismissing the appeal of Mr Ruzehaji.

In that case, the accused (who had been charged with drug offences) sought to appeal orders made in the District Court of SA that he be examined under the POCA.

After the orders for his examination were made some years ago, the accused acquiesced with the orders and took no steps to challenge them. He was in fact examined. Prior to the examination, the Commissioner gave an undertaking that the examination would not touch on matters relevant to the accused's criminal charges.

Subsequently, the accused changed solicitors. The Commissioner sought to examine the accused (and others) further and the accused, at that point, made application to appeal the examination order.

The Full Court recognised that an examination order, when made *ex parte* (as it was in that case) could be challenged *inter partes*. However, the Full Court dismissed the appeal principally because of the way in which the accused had conducted his case; he had acquiesced with the examination order for some years.

In dismissing the appeal, the Full Court placed emphasis on the undertaking of the Commissioner not to examine on matters relevant to the criminal charges. That is a significant matter. Where there is a risk of overlap between issues relevant to the criminal prosecution and the proceedings under the POCA (as there often is), the absence of an undertaking not to examine on matters relevant to the criminal prosecution ought to be relevant to the exercise of discretion whether to order and examination in

the first place or for a stay of an examination once ordered.

The Full Court also considered, and rejected, a constitutional law argument made on behalf of the accused that the examination provisions of the POCA offend against the separation of powers principle.

The Full Court affirmed that, where proceedings under the POCA result in relevant prejudice to an accused, the Court has power to stay such proceedings.

**About the author**

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He was admitted to practice in 1996 and, prior to coming to the Bar in 2004, was a partner with Deacons (now Norton Rose Fulbright).

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